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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

FRANK J.BROWN
Petitioner,

v.

ALABAMA DEPARTMENT OF
PENSIONS AND SECURITY, et al.,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Frank J. Brown, pro-se
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39 pp

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I. May a plaintiff receive the Seventh Amendment right to a jury trial upon the discovery of fraud of plaintiff's counsel?.....

II. Where personal problems of counsel caused him grossly to neglect a diligent plaintiff's case and to mislead plaintiff, is handicapped plaintiff eligible to have their civil rights discrimination case reinstated?.....

III. Does a District Court lack jurisdiction to automatically appoint counsel for unrepresented in forma pauperis plaintiffs in job civil rights cases to provide more constitutional protection?

IV. Can a dismissal for want of prosecution be set aside because of gross and inexcusable neglect of plaintiff counsel when plaintiff was suffering from anxiety and illness?.....

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No.

In the SUPREME COURT of the UNITED STATES OCTOBER TERM, 1987

FRANK J. BROWN,

PETITIONER

TO THE SUPREME COURT OF THE UNITED STATES: Judgement of the United States Court of Appeals for the Eleventh Circuit entered on December 31, 1986, affirming the dismissals of the United States District Court for the Northern District of Alabama.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the dismissals of the Northern District, copy of this decision and decision denying the Petitioner's petition for rehearing appear in the Appendix.

The Petitioner, Frank J. Brown respectfully prays that a writ of certiorari issue to review judgement of the United States Court of Appeals for the Eleventh Circuit entered on December 31, 1986.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit rendered its opinion and entered its judgement on December 31, 1986. The Petitioner filed a timely petition for rehearing in the Eleventh Circuit which was denied on January 30, 1987. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1), which said statutory provision is believed to confer jurisdiction on this Court.

1254(1)A listing of all parties-respondent not shown on caption of case on this petition is as follows: Dekalb County Department of Pensions & Security, and Larry DuPree, Director, and Bernice Parker, Former Director.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States, Amendment VII

In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

Constitution of the United States, Amendment V

No person shall...be deprived of life, liberty, or property, without due process of law...

Federal Rules of Civil Procedure, Rule 59

New Trials:Amendments of Judgements

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues(1) in any action in which there has been a trial by jury, for

any of the reasons for which new trials have heretofore been granted in action at law in courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgement if one has been entered, take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgement.

RELIEF UNDER SUBDIVISION (b)

Federal Rules of Civil Procedure, Rule 60(b)

As is recognized in many cases, a motion for relief from a judgement under Rule 60(b) is addressed to the discretion of the court, although there are some situations so extreme that the result is

foreordained and it would be an abuse of discretion to either grant relief or deny relief.

Federal Rules of Civil Procedure. Rule 60(b)(6)

(6) ..the leading cases speaking of a requirement of exceptional or extraordinary circumstance...

STATEMENT OF THE CASE

Prior to September 12, 1982, plaintiff was employed by defendant at the State of Alabama Dekalb County Department of Pensions and Security(Human Services, Dekalb DPS, et al.) as a social worker. Plaintiff was employed in 1969 and six months later underwent extensive electroshock therapy and subsequently many years up until 1982, rehabilitation and job accommodation and restructuring at Dekalb DPS, Fort Payne, Alabama. Prior to plaintiff's discharge, his

director, defendant, Mrs. Bernice Parker persistently demanded that plaintiff retire on his disability. Ten months prior to plaintiff's discharge, plaintiff was admitted by Dr. Allie Boyd to Druid City Hospital, Tuscaloosa, Alabama, for extensive neurological testing due to the seriousness of plaintiff's disability. After plaintiff was discharged ostensibly for failure to or inability to do the work, (EVENTHOUGH PLAINTIFF HAD FILED WITH EEOC a job discrimination complaint four months prior to discharge from job). Plaintiff was financially unable to hire counsel to file discrimination suit. Accordingly, plaintiff filed suit pro-se in the United States District Court for the Northern District of Alabama in

Ausust 1984, just prior to the two year statute of limitations. And after this, Attorneys Charles McGee and Steve Bussman, Fort Payne, Alabama, asserted that they would take over my job discrimination suit for me and handle it along with my complaint to The Office For Civil Rights in Atlanta and Washington D. C. and also continue to handle plaintiff's two zoning and rent cases. Attorneys McGee and Bussman were partners with Attorney Hawkins, a retired Dekalb County Judge. Retired Judge Hawkins is a very close acquaintance with defendant's former director, Mrs. Bernice Parker due to the very involved case load of child welfare cases that were adjudicated over the years by and with the information Mrs. Parker provided to Judge Hawkins. It seems that since former Dekalb County Circuit Judge Hawkins and former Dekalb

County Department of Pensions and Security Director, Mrs. Parker fraudulently conspired with Judge Hawkins' other law partners, McGee and Bussman to delay promised action on plaintiff's suit CV-84-AR-2210-M and without the knowledge of plaintiff nor District Judge Acker as to the reason for the delay. Judge Acker dismissed said suit on August 12, 1985, for want of prosecution. During this time plaintiff continued to be disabled by anxiety and illness and also Attorney McGee was also experiencing domestic problems which could very well have contributed to his aggravating circumstances to grossly neglect civil rights discrimination case of diligent client plaintiff.

Plaintiff has just learned from a friend how his case was also malpracticed by plaintiff's former Attorney McGee.

Information sheds new light as plaintiff alleges that former director of defendant, Mrs. Bernice Parker, was also plaintiff's director for about 12 years, and former Dekalb County Circuit Judge Hawkins, for many years worked in liasson with defendant's director on the ajudication of many child-welfare and other cases connected with the DEFENDANT, DEKALB COUNTY DEPARTMENT OF PENSIONS AND SECURITY, et al. Throughout these years there was a well-established rapport between Director Parker and Judge Hawkins in advisorial capacities for perspectives on welfare-related cases. Former Dekalb County Circuit Judge Hawkins was a law partner with plaintiff's attorney, Attorney Charles McGee in 1985 when case herein was fraudulently mishandled by

Attorney McGee, by the fact that Attorney McGee was very dilatory in taking the actions as initially promised on the case herein prior to its dismissal in 1985, and subsequently did not appeal herein case as he had promised plaintiff, however Attorney McGee did make an amended complaint to herein case while plaintiff was in his office one day and plaintiff heard this being made while at Attorney McGee's desk, however when plaintiff was supposed to deliver it to District Court after lunch, Attorney McGee called and discovered case had been dismissed a few days earlier, to which Attorney McGee re-assured plaintiff that he would be sure and appeal the dismissal before the time allowed. During the time Atty McGee broke appointments with plaintiff, and finally had plaintiff in his office to work on case just prior to its dismissal. On

receipt of materials relevant to herein case from opposing counsel and the District Judge Acker, who apparently, like plaintiff, was never aware that Attorney McGee was purposely being slow and had actually received no confirmation that Attorney McGee was handling case other than that reported by plaintiff to defendant counsel. Plaintiff would read these materials and then hand deliver(The Court and defendant counsel had no knowledge of why there was delay on plaintiff's part, but plaintiff thought that such delay was normal for cases) to Attorneys McGee or Bussman or their secretarial staff. And Attorneys McGee and Bussman indicated in 1984 and 1985 that they would handle herein case along with plaintiff's application and complaint to The Office For Civil Rights in Atlanta and Washington. D.C. However, at first on

that case, Attorney McGee suggested that plaintiff just utilize his office space and address to correspond to the Washington office, and on two other cases, a delinquent rents case and a rental unit zoning case. Attorneys McGee and Bussman did handle for plaintiff also.

After dismissal of first case, plaintiff instituted second case CV-85-C-2449-M September 1985, in same court before the three year statute of limitations was up on wilful discrimination for which plaintiff's case is applicable, and on November 8, 1985, plaintiff extensively amended CV-85-C-2449-M and on 12th February, 1986, this case was dismissed due to prior adjudication on same merits. In March 1986, plaintiff appealed

earlier denials of Rule Motion 60(b) based on excusable neglect and then on December 31, 1986, both appeals of earlier denials were AFFIRMED by Fay, Anderson, and Edmondson, Circuit Judges, United States Court of Appeals For the Eleventh Circuit, and subsequently denied on January 30, 1987, on a timely filed petition for rehearing.

ARGUMENT

I.

May a plaintiff receive the Seventh Amendment right to a jury trial upon discovery of fraud of plaintiff counsel?

Plaintiff concludes that since there has been such close working relationship with plaintiff's counsel, McGee and Bussman and their partner Hawkins, who did have extensive dealings and

collaboration with defendant Parker, over many years, that there exists fraud of plaintiff counsel toward plaintiff: so that plaintiff initially filed in August 1984, CV-84-AR-2210-M, would never be heard in court due to delay of plaintiff counsel, and subsequent failure of plaintiff counsel to appeal dismissal, as promised and re-assured, to plaintiff, by Attorney McGee at the time assiduous care would be taken to keep the case from default, and after dismissal of case, Attorney McGee assured plaintiff that case No. CV-84-AR-2210-M would be timely appealed by Attorney McGee. Handicapped plaintiff worked with defendant employer and was discharged, wilfully violating civil rights discrimination rules, and thereby plaintiff's counsel McGee

conspired to by fraud to delay and failed to appeal as promised to plaintiff the subsequently dismissed case of plaintiff. Plaintiff should receive case re-instated in District Court. Mervin C. McKinney, Appellant, v. Joseph Boyle, et al., Appellee. No.22374 United States Court of Appeals. Dec. 4, 1968. The Court of Appeals. Duniway, Circuit Judge, held that plaintiff's allegations that the plaintiff's allegations that the settlement stipulations had been procured by fraud within rule relating to setting aside of dismissals and court trial improperly dismissed motion on ground that it had not been filed within one-year period otherwise provided. FRAUD on the part of a party's own counsel and his former wife, does not come under Rule 60(b)(3) and relief is available under

Rule 60(b)(6) eventhough more than a year has passed. McKinney v. Boyle, C.A.9th, 1968, 404 F.2d 632, certiorari denied 89 S.Ct. 1481, 394 U.S. 992, 22 L.Ed.2d 767.

II.

Where personal problems of counsel caused him grossly to neglect a diligent plaintiff's case and to mislead plaintiff, is handicapped plaintiff eligible to have their civil rights discrimination case reinstated?

Plaintiff was unaware that plaintiff's Attorney McGee was having many domestic problems with his marriage at the time that Attorney McGee grossly neglected plaintiff's case causing it to be DISMISSED due to neglect and delay and other reasons and plaintiff's counsel was re-assuring plaintiff that it was going

to be handled in a timely manner by plaintiff Attorney McGee. GROSS NEGLECT of plaintiff's counsel, of which plaintiff was unaware, coupled with absence of neglect on the part of plaintiffs, constituted more than "excusable neglect" referred to in Rule 60(1) and permitted relief under Rule 60(b)(6). King v. Mordowanec, D.C.R.I.1969, 46 F.R.D. 474. Preoccupation of counsel with other matters, and his failure to notify client that case was dismissed for want of prosecution, was held so extraordinary as to fall under subdivision (6), rather than subdivision (1) dealing with "excusable neglect", and thus relief was permitted after more than one year had elasped. L. P. Steuart, Inc. v. Matthews, C.A.1964, 329 F.2d 234, 117 U.S.App.D.C.,

Certiorari denied 85 S.Ct. 50, 379 U.S. 824, 13 L.Ed.2d 35, noted 1965, 67 W.Va.L. Rev. 641.

Regardless of when Rule Motion 60(b) is made, it is addressed to the discretion of the district court. In general relief is given under clause (6) in cases in which the judgement was obtained by the improper conduct of the party in whose favor it was rendered or judgement resulted from the excusable default of the party against whom it was directed under circumstance going beyond earlier clauses of the rule. These cases certainly seemed to establish clause (6) AND THE FIRST FIVE CLAUSES are mutually exclusive and that relief cannot be granted under clause (6) if it would have been available under other clauses. This reading seems required also by the rule. (WRIGHT & MILLER).

III.

Does a District Court lack jurisdiction to automatically appoint counsel for unrepresented in forma pauperis plaintiffs in job civil rights cases to provide more constitutional protection?

When action CV-84-AR-2210-M was filed by plaintiff, plaintiff was not advised at the time to also file for counsel at the time of in forma pauperis application and could not find counsel at the time.

There are civil rights job discrimination plaintiffs that are in forma pauperis that receive court appointed counsel, and counsel appointed

at time of approval of unrepresented in forma pauperis plaintiff would appear in accord.

IV.

Can a dismissal for want of prosecution be set aside because of gross and inexcusable neglect of plaintiff counsel when plaintiff was suffering from anxiety and illness?

Plaintiff counsel's gross and inexcusable neglect should be taken into consideration and plaintiff's dismissal set aside as plaintiff as in TRANSPORT POOL DIV. OF CONTAINER LEASING, INC., a California corporation, v. JOE JONES, d/b/a JOE JONES TRUCKING COMPANY and JESSIE B. BLAYTON, Civ. A. Nos. 12099, 12590. United States District Court, N. D. Georgia, Atlanta Division. 1970.

On two other cases; rent and zoning, Attorneys McGee and Bussman, were paid

two hundred dollars each and the civil rights discrimination case in District Court, Attorney McGee indicated a one-third contingency charge would be made.

It is therefore requested by plaintiff that this new and more enlightening information of counsel fraud and gross neglect of counsel be considered so the dismissal of August 12, 1985, can be set aside due to exceptional and extraordinary circumstances under Rule Motion 60(b)(6).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submittted,

FRANK J. BROWN, pro-se
P.O Box 222
Fort Payne, Alabama
35967

(205) 845- 5428

CERTIFICATE OF SERVICE

I certify that I have served three copies of the foregoing Petition for Writ of Certiorari on all parties required to have been served, by mailing same to the Honorable William F. Prendergast and the Honorable Sharon E. Ficquette, Counsel for Defendants-Appellees, STATE OF ALABAMA Department of Pensions and Security, et al., Administrative Bldg., 64 North Union Street, Montgomery, Alabama 36130, properly addressed and with sufficient first-class postage pre-paid this13thday of May 1987.

Frank J. Brown, pro-se

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-7175

Non-Argument Calendar

D.C. Docket No. 85-2449

FRANK BROWN,
Plaintiff-Appellant,
versus

STATE OF ALABAMA DEPARTMENT
OF PENSIONS AND SECURITY AND
DEKALB COUNTY DEPARTMENT OF
PENSIONS AND SECURITY, AND
MR. LARRY DUPREE, DIRECTOR
AND MRS. BERNICE PARKER, FORMER DIRECTOR,
ET AL.,
Defendants-Appellees.

No. 86-7200

Non-Argument Calendar

D.C. Docket No. 84-2210

FRANK BROWN,
Plaintiff-Appellant,
versus

DEKALB COUNTY DEPARTMENT
OF PENSIONS AND SECURITY,

Defendant-Appellee.

Appeals from the United States
District Court for the Northern District
of Alabama

Before FAY, ANDERSON, and EDMONDSON,
Circuit Judges.

JUDGEMENT

These causes came to be heard on the transcipt of the record from the United States District Court for the Northern District of Alabama, and were taken under submission by the Court upon the record and briefs on file , pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this Court that the judgements of the said District Court

in these causes be and the same are hereby, AFFIRMED:

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 31, 1986

For the Court:Miguel J. Cortez, Clerk

By: DAVID MOLAND
Deputy Clerk

ISSUED AS MANDATE: FEB 10, 1987

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-7175

FRANK BROWN,

Plaintiff-Appellant,

versus

STATE OF ALABAMA DEPARTMENT OF

PENSIONS AND SECURITY AND DEKALB COUNTY

DEPARTMENT OF PENSIONS AND SECURITY,
et al.,

Defendants-Appellees.

No. 86-7200

FRANK BROWN,

Plaintiff-Appellant,

versus

DEKALB COUNTY DEPARTMENT OF
PENSIONS AND SECURITY,

Defendant-Appellee.

Appeal from the United States District
Court for the Northern District
of Alabama

ON PETITIONS FOR REHEARING

(JAN 30 1987)

BEFORE: FAY, ANDERSON AND EDMONDSON, Circuit Judges.

PER CURIAM:

The petitions(s) for rehearing filed by appellant, FRANK BROWN, is denied.

ENTERED FOR THE COURT:

FAY

United States Circuit Judge

FILED JAN 30, 1987

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MIDDLE DIVISION

FRANK BROWN,

PLAINTIFF)

VS.)

) CIVIL ACTION NO.

) 84-AR-2210-M

DEKALB COUNTY DEPARTMENT)
PENSIONS &)
SECURITY,)
DEFENDANT

ORDER OF DISMISSAL

This case is in the following posture.

It is set for trial on September 9, 1985.

Plaintiff, Frank Brown, who is pro se, failed to present a proposed pre-trial order at the pre-trial conference held on July 1, 1985. At that conference the court clearly explained to plaintiff that a form to be used for preparing a pre-trial order had been mailed to him

with the order setting the pretrial conference, and that a plaintiff is required to present the initial draft of a pre-trial order and submit it first to the defendant and then to the court. The court then re-scheduled the pre-trial conference for August 9, 1985.

On July 1, 1985, plaintiff was also informed by defendant (and the court concurred) that there is no legal entity entitled "DeKalb County Department of Pensions & Security", and that plaintiff's complaint should be amended properly to name the defendant.

As has been made apparent to plaintiff from the ruling on defendant's earlier motion for a summary judgement, a crucial factual issue is the date upon which plaintiff actually received his

right-to-sue letter in light of the fact that the EEOC destroyed its records of the transaction. Defendant has given notice to plaintiff on several occasions to depose plaintiff, but plaintiff has failed and refused to appear for deposition.

On August 9, 1985, plaintiff failed to appear for the re-scheduled pre-trial conference and has not communicated in any way with the court or with defendant's counsel.

The court has leaned over backards to accommodate to plaintiff's pro se status and has given plaintiff every opportunity to prosecute his action. Perhaps for cause plaintiff has chosen to abandon his action, and there is no viable alternative under the circumstances except dismissal.

For good cause shown, of the court's own motion, the action is DISMISSED for want of prosecution.

Costs are taxed against plaintiff.

DONE this 12th day of August, 1985.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

FRANK BROWN,

Plaintiff,

vs.

) CIVIL ACTION
) NUMBER
) 85-C-2449-M

STATE OF ALABAMA DEPARTMENT
OF PENSIONS AND SECURITY,)
et al.,)
Defendants.)

ORDER OF DISMISSAL

This cause came to be heard upon defendant's motion to dismiss the above styled action on the ground that it is barred by a prior adjudication on the merits with respect to the same cause of action.

On August 27, 1986, the plaintiff filed an action in this court styled Frank J. Brown v. Dekalb County Department of Pensions and Security, CV

84-AR-2210-M. In an order entered on August 12,1985, United States District Judge William M. Acker, Jr., dismissed the action for lack of prosecution. Pursuant to Fed.R.Civ.P. 41(b), said order of dismissal constitutes an adjudication on the merits which bars further adjudication on the same cause of action. See Bierman v. Tampa Electric Co., 604 F.2d 929 (5th Cir. 1979).

There is no question that the present action involves the same cause of action as the dismissed case since the plaintiff literally filed the same complaint in both actions. The plaintiff simply crossed out the docket number from the first case and then refiled the complaint.

Accordingly, the case must be dismissed. It is therefore ORDERED, ADJUDGED and DECREED that the above styled case is dismissed with prejudice, and that the plaintiff shall bear the costs of this action.

DONE this 12th day of February, 1986.

U. W. Clemon
UNITED STATES DISTRICT JUDGE